INDEX

	Page
Motion	i
Interest of the *Amicus*	i-vi
Conclusion	vi
Brief	1-17
Reasons for Granting the Writ	2
Introduction	2-3
I. The Issue is "Ripe" for Determination	3-5
II. The Employer Is an Indispensable "Party" in Joint Board Proceedings	5-11
III. The Decision Below Undermines Voluntary Arbitration Procedures	12-15
IV. The Decision Below Disrupts Established Collective Bargaining Relationships and Conflicts With Other Statutory Provisions	15-17
Conclusion	17
Appendix	1a-7a

CITATIONS

CASES:

A.W. Lee, 113 NLRB 947 (1955) 8, 11
Acoustical Contractors, 119 NLRB 1345 (1958) 8
Amalgamated Utility Workers v. *Consolidated Edison Co.,* 309 U.S. 261 (1940) 13
Building and Construction Trades Council (Charles J. Dorfman), 173 NLRB No. 208, 69 LRRM 1594 (1968) 9
Carey v. *Westinghouse Electric Corp.,* 375 U.S. 261 (1964) 13, 14
International Harvester Co., 138 NLRB 923 (1962) 13

Page

Jefferson County Carpenters' District Council (S & W Masonry, Inc.), 173 NLRB No. 190, 69 LRRM 1577 (1968) 15
Millwrights' Local 1102 (Don Cartage), 154 NLRB 513 (1965) 14
Millwrights' Local 1862 (Jelco, Inc.), 184 NLRB No. 58, 74 LRRM 1485 (1970) 11
N.L.R.B. v. *Radio & Television Broadcast Engineers' Local 1212 (Columbia Broadcasting System)*, 364 U.S. 573 (1961) 8, 12, 14
Operating Engineers' Local 150 v. *Wild Masonry Co.*, C.A. No. 70-C-2944 (D.C.N.D.Ill. 1970) 4
Operating Engineers' Local 450 (Rust Eng'r. Co.), 169 NLRB No. 149, 67 LRRM 1389 (1968) 11
Operating Engineers' Local 825 (Burns & Roe, Inc.) v. *NLRB*, 410 F.2d 5 (3rd Cir. 1969) 3
Plumbers' Local 129 v. *Laborers' Local 91 and Albert Elia Bldg. Co.*, C.A. No. 1970-581 (D.C.W.D.N.Y. 1970) 4
Plumbers' Local 129 v. *Laborers' Local 210 and Edward J. DeBartolo Corp.*, C.A. No. 1970-580 (D.C.W.D.N.Y. 1970) 4
Plumbers' Local 157 v. *Laborers' Local 204 and L & K Contracting Co.*, C.A. No. 70-C-109 (D.C.S.D.Ind. 1970) 4
Plumbers' Local 162 v. *Laborers' Int'l. Union and Laborers' Local 1410 and B.G. Danis, Inc.*, C.A. No. 3980 (D.C.S.D.Ohio 1970) 4
Plumbers' Local 162 v. *Laborers' Int'l. Union and Laborers' Local 1410 and Ohio Excavators, Inc.*, C.A. No. 3979 (D.C.S.D.Ohio 1970) 4
Plumbers' Local 189 (R.W. Wander), 176 NLRB No. 129, 71 LRRM 1340 (1969) 9
Quinn & Riggers & Machinery Erectors, Local 575 v. *NLRB*, (unreported decision Nos. 19673 & 19686), 61 LRRM 2690 (1966) 15
Smith v. *Evening News Association*, 371 U.S. 195 (1962) 14
Spielberg Mfg. Co., 112 NLRB 1080 (1955) 13
United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) 3
United Steelworkers v. *Warrior & Gulf*, 363 U.S. 574 (1960) 3, 13

Page

STATUTES:

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*:

§ 7 17

§ 8(a)(2) 17

§ 8(a)(3) 17

§ 8(b)(4)(D) 2, 3, 5, 9, 16

§ 10(a) 13

§ 10(k) .....ii, v, 2, 3, 5, 7, 9, 10, 12, 14, 15, 16

Labor Management Relations Act, as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 141, *et seq.*:

§ 203(d) 12

§ 301 16

§ 303 16

MISCELLANEOUS:

Construction Labor Report, 732, A-13; 742, A-1 (1969) 6

Mills, *The Construction Industry,* 21 Lab. L.J. 498 (August 1970) 6

Plan for Settling Jurisdictional Disputes Nationally and Locally, Art. III, § 7, p. 10 (1970) 6

Procedural Rules and Regulations of the National Joint Board, (1968) 8, 16

Proceedings of the 41st Convention, Building and Construction Trades Department (AFL) 1948 6

Strand, *Jurisdictional Disputes in Construction: The Causes; The Joint Board, and the NLRB* (1961) .. 7

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Laborers' International Union of North America, AFL-CIO, hereby moves for leave to file a brief *amicus* in support of the Petition. The Solicitor General, Contractor Intervenors, and the Union Intervenors have granted their consent. Counsel for Plasterers' Local 79 has refused consent.

INTEREST OF THE AMICUS

1. The Laborers' International Union, an organization chartered in 1903 by the American Federation of Labor, is presently an affiliate of the AFL-CIO, and is the largest per capita tax affiliate of its Building and Construction Trades Department. The Laborers' Union, with a membership in excess of 600,000, represents highly skilled, semi-skilled and unskilled employees engaged in all phases of building, heavy and highway, and utility construction. As a result of organizational activities, and through thousands of collective bargaining agreements, national and local in scope, the Laborers' Union represents the largest number of craftsmen employed on construction projects and is, therefore, most likely to be affected by the adverse consequences of the decision below.

2. Under provisions of the constitution of the Building and Construction Trades Department, the Laborers' International Union and all other affiliated International Unions are bound to utilize the procedures of the Plan for the Settlement of Jurisdictional Disputes ("Plan"), which operates through the medium of a Joint Board. The Plan also provides that its procedures and awards are binding only on those employers

who have filed stipulations signifying their intention to be bound. The instant case presents recurring situations in which an employer, who had never assented to be bound by Joint Board procedures, is confronted by a union which engages in picketing to enforce a Joint Board award issued in its favor.

The court below, in construing § 10(k), held that the employer is not a "party" to a work assignment dispute; that only the disputing unions need adjust, or agree upon methods for the adjustment of, the dispute; and that where, as in the instant case, the unions are bound to the Joint Board, the resulting job decision is not only binding on the employer, but that the NLRB is forever ousted of authority to hear and determine the merits of the dispute.

The court's decision flies in the face of the express provision of the Plan as well as the consistent interpretation and representations rendered by parties to the Plan in proceedings before the NLRB and before this Court. By erroneously severing the employer from the dispute-resolving procedures, the court below has totally disrupted the long-settled basis for Joint Board and NLRB operations, and has injected notions which are foreign to the vital interests of both management and labor.[1] Indeed, following the long line of unwaver-

[1] In addition to the NLRB and the employers directly involved in the dispute, the Plasterers' Union, Bricklayers' Union and Tile Setters' Union participated in the court below. In addition, the court granted permission for the filing of briefs *amici* by the Building and Construction Trades Department, AFL-CIO, and by the Ceramic Tile Institute of America. Following the court's decision on June 30, 1970, on the NLRB's Motion for Rehearing with Suggestion for *en banc* Consideration, the court granted permission for the filing of briefs *amici* by the Mason Contractors' Association of America, the Associated General Contractors of America, and the Laborers' International Union of North America.

ing NLRB and court decisions, and consistent with the contemporaneous recognition by the parties to the Plan, the Laborers' International Union has historically maintained within the Building and Construction Trades Department that it is bound by determinations of the Joint Board only where the employer responsible for the work assignment has stipulated or otherwise bound himself to Joint Board procedures. The decision below thus places the historical position of the Laborers' Union in jeopardy.

3. In addition, as an affiliate of the Building and Construction Trades Department, with a General President who is a member of the Joint Board Negotiating Committee, and with an international vice-president who regularly sits as a member of the Joint Board, the Laborers' International Union has special interests and experience which are beyond the expertise of the immediate parties, and whose views would be of assistance to this Court in focusing more directly on the issues involved herein.

4. The vast majority of employers in the construction industry have not agreed to be bound by the procedures of the Joint Board. The vast majority of the employees in the construction industry represented by the Laborers' Union are employed by contractors who are members of the Associated General Contractors of America ("AGC"). In addition to the AGC, there are other major segments of the construction industry, such as the Mainline-Pipeline Industry,[2] the home building

[2] The Mainline-Pipeline Industry has never been subject to Joint Board procedures, notwithstanding the fact that the Laborers' International Union, Plumbers' International Union and Operating Engineers' International Union are parties to collective bargaining agreements covering that industry and are each affiliated with the Building and Construction Trades Department.

industry, the plastering and masonry industries,[3] and the heavy and highway industry, which are not participants in the operations of the Joint Board, but which employ substantial numbers of construction craftsmen represented by the Laborers' Union.[4] The reasons for these employers' decisions not to stipulate to Joint Board procedures varies, but many have expressed opposition to the Plan because, notwithstanding procedural provisions to the contrary, the Joint Board refuses to consider consumer, employer and employee interests, and instead predicates its determinations almost exclusively on the basis of ancient or outmoded agreements and practices which bear no relationship to the modern needs of a highly competitive and dynamic industry.

The Laborers' Union has local and national agreements with employers in all of the aforementioned industries. However, there are no employers with voice or vote on the Joint Board to represent the interests of the General Contractor, the principal employer of members of basic trade unions (which includes the Laborers), and thus, no assurance that the interests of the General Contractor and his laborer-employees will be preserved and protected in proceedings conducted by

[3] The Mason Contractors' Association and the Contracting Plasterers and Lathing International Association withdrew from the Joint Board Plan on August 1, 1963, and November 11, 1963, respectively.

[4] By conservative estimate, the following numbers of employees represented by the Laborers' International Union are employed by the following contractor associations: AGC employs approximately 250,000; Mason Contractors Association of America employs approximately 100,000; Contracting Plasterers and Lathing International Association employs approximately 10,000 to 15,000; and there are approximately 40,000 laborers employed in the Pipeline Industry.

the Joint Board. To the contrary, all the present employer associations which participate on the Joint Board are specialty contractor groups which employ mechanical trades, and these employers do not regularly employ laborers represented by the Laborers' Union. Nevertheless, according to the decision below, the Joint Board is empowered to disregard the interests of the General Contractor—and therefore the basic trades unions which represent his employees—and render binding determinations which will forever foreclose any recourse by that employer or any other person to the dispute-resolving procedures of § 10(k) of the Act.

5. The decision below threatens the stability of collective bargaining relationships in the construction industry. The collective bargaining agreements which the Laborers' Union has with employers providing for resolution of disputes by procedures *other than* those of the Joint Board will be sapped of vitality, and the attempted implementation of Joint Board decisions at the jobsite over nonstipulated contractors and their employees can only lead to undying jurisdictional strife.

Further, the Laborers' International Union stands to suffer irreparable injury since, under the decision below, the Joint Board could now proceed to render a national award, giving to another union that work which employees represented by the Laborers' Union have performed in excess of fifty years to the satisfaction of the owner, the employer and the public—without the participation, voice or vote of a single employer from the industry in which such work is performed—and even if the trade awarded the work had never been employed in that branch of the industry. In addition to the loss of membership which such action would pro-

duce, the stability provided by existing collective bargaining agreements would be substantially undermined, and previous successful efforts in organizing unorganized employees will have been for naught.

CONCLUSION

For the foregoing reasons, the Laborers' International Union believes that it has sufficient interest in this proceeding and, accordingly, respectfully requests the Court to grant this motion for leave to file the accompanying brief *amicus* in support of the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ROBERT J. CONNERTON
ARTHUR M. SCHILLER
JULES BERNSTEIN
905 - 16th Street, N. W.
Washington, D. C. 20006
Counsel for Laborers' International Union of North America, AFL-CIO
202/737-8320

December 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1184

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AS AMICUS CURIAE

This brief *amicus* is filed by the Laborers' International Union of North America, AFL-CIO, contingent upon the Court's granting the foregoing Motion for Leave to File a Brief as *Amicus Curiae.*

The opinions below, the basis of this Court's jurisdiction, the question presented, and the statutory provisions involved are set out on pp. 1-3 of the NLRB's Petition.

The interest of the Laborers' International Union appears on pp. i-vi of the above-noted Motion.

REASONS FOR GRANTING THE WRIT

Introduction

The instant case arises in the building and construction industry and involves the question of primary jurisdiction and supremacy where there is a direct conflict between jurisdictional dispute awards rendered by the National Labor Relations Board ("NLRB") and the construction industry's private Plan for Settling Jurisdictional Disputes Nationally and Locally ("Plan") through the procedures of its Joint Board.

The court below ruled that "the parties" to a jurisdictional dispute included only the disputing unions and not the employer whose work assignment generated the conflict, with the consequence that the NLRB "may not properly proceed to determine a jurisdictional dispute pursuant to Section 10(k) when the disputing unions [but not the employer] have agreed to settle their dispute through binding arbitration." (NLRB Pet. App. A, p. 24). By so ruling, the court below swept away over twenty years of consistent NLRB interpretation and administration of §§ 8(b)(4)(D) and 10(k), and reached a result totally at odds with the express provisions of the Joint Board Plan and the understanding which the parties thereto have consistently held.

The consequences of the court's decision far transcend the merits of the instant dispute or the interest of the immediate parties. While the specific ruling places the court's imprimatur on the operations of the Joint Board, the radical principle that the employer responsible for the assignment of work is not a necessary "party" to any agreed upon method of adjustment, produces radiations which directly affect and

undermine the entire corpus of arbitration law.[1] It is thus not only a question of correcting a lower court's error on a matter of statutory interpretation but, of even greater dimension, the need to protect the orderly and salutary role which arbitration has heretofore played in preserving stable collective bargaining relationships.

I. THE ISSUE IS "RIPE" FOR DETERMINATION

Petitioner has alleged that, with regard to the question of whether an employer is a "party" to a jurisdictional dispute processed under §§ 8(b)(4)(D) and 10(k), for over twenty-three years the courts of appeals "have approved" the Board's interpretation,[2] and that the issue is of manifest importance in the administration of the Act." (NLRB Pet., p. 10). That parties affected by § 8(b)(4)(D) Orders have previously acquiesced in the Labor Board's consistent interpretation of § 10(k) gives added significance to the twenty-three years of judicial approval, for in the industrial arena where experienced and sophisticated counsel for both management and labor have vigorously challenged virtually every other provision

[1] *Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, 582 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

[2] Indeed, in *Local 825, Operating Engineers (Burns & Roe, Inc.)* v. *NLRB*, 410 F.2d 5 (3rd Cir. 1969), *cert. granted on another issue*, this Term, Nos. 40 and 42, the court of appeals, in enforcing the Labor Board's 8(b)(4)(D) Order, approved the NLRB finding that "Burns, White [the employers] and Local 825 were both bound by Joint Board rulings" [162 NLRB 1617, 1632 (1967)], and specifically held that the Board properly declined to hold a 10(k) hearing because the "present parties had agreed in advance upon a method of voluntary adjustment and did in fact utilize that method in this case." (410 F.2d 5, 9).

of the statute, the absence of exception over so vital an issue can hardly be attributed to oversight. The unprecedented decision of the court below enunciates a clear and detailed rejection of uniform Labor Board and judicial precedent, and neither the passage of time nor the process of "elucidating litigation" can sharpen the issue or alter the conflict which the decision below has created.

Indeed, it is already apparent that delay by this Court can only contribute to greater industrial strife and an unwarranted increase in litigation as unions which are successful before the Joint Board pursue diverse routes "to compel an employer to change his assignment, or [the incumbent] union to renounce an assignment that the employer is willing to give." (NLRB Pet. App. A, p. 45). Thus, in the less than three months which have elapsed since the court below denied the Board's Petition for Rehearing, five lawsuits have been filed by the Plumbers' Union against the Laborers' Union and those employers whose work assignments are being disputed.[3] Since no party to the

---

[3] *Plumbers' Local 157* v. *Laborers' Local 204 and L & K Contracting Co.*, (complaint filed Oct. 21, 1970), C.A. No. 70-C-109 (D.C.S.D.Ind.); *Plumbers' Local 162* v. *Laborers' Int'l. Union and Laborers' Local 1410 and B. G. Danis, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3980 (D.C.S.D.Ohio); *Plumbers' Local 162* v. *Laborers' Int'l. Union and Laborers' Local 1410 and Ohio Excavators, Inc.*, (complaint filed Dec. 9, 1970), C.A. No. 3979 (D.C.S.D. Ohio); *Plumbers' Local 129* v. *Laborers' Local 210 and Edward J. DeBartolo Corp.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-580 (D.C.W.D.N.Y.); *Plumbers' Local 129* v. *Laborers' Local 91 and Albert Elia Bldg. Co.*, (complaint filed Dec. 14, 1970), C.A. No. 1970-581 (D.C.W.D.N.Y.). In addition, a similar action was filed solely against a contractor to protest his work assignment to laborers: *Operating Eng'rs. Local 150* v. *Wild Masonry Co.*, (complaint filed Nov. 23, 1970), C.A. No. 70-C-2944 (D.C.N.D.Ill.).

Joint Board had, in the past, resorted to the courts to enforce Joint Board awards, the decision in the instant case has already spawned the first of what are likely to be countless efforts to displace the NLRB from its central role in determining work assignment controversies. In the interests of preserving industrial peace, and to avoid unwarranted litigation designed to disrupt established collective bargaining relationships, there is an urgent need for this Court to grant review.

II. THE EMPLOYER IS AN INDISPENSABLE "PARTY" IN JOINT BOARD PROCEEDINGS

Prior to the enactment of the Taft-Hartley amendments in 1947, the construction unions affiliated with the Building and Construction Trades Department, AFL, had their own "Referee" system for resolving jurisdictional disputes. This was strictly an inter-union arrangement which made no provision for employer participation in any form. On June 23, 1947, the Taft-Hartley Act was enacted into law. On July 9, 1947, the Building Trades Department suspended the "Referee" system.

Thereafter, during January 21-25, 1948, the Executive Council of the Building Trades Department, with the assistance of John T. Dunlop and NLRB General Counsel Robert Denham, met with negotiating committees composed of employer-members of the Associated General Contractors of America ("AGC") and various specialty contractor associations in an effort to devise a plan which would conform to the requirements of §§ 8(b)(4)(D) and 10(k) of the Act. These negotiations resulted in the establishment of a Plan for National Joint Board for Settlement of Jurisdictional Disputes which, as suggested by the NLRB, would be binding on those employers and unions who committed them-

selves to the Plan's procedures.[4] The new Plan was executed by the Building and Construction Trades Department, the AGC, and seven National Associations of Specialty Contractors, and became effective May 1, 1948. (The negotiations and complete text of the original Plan are described in greater detail in the attached excerpt from the official Proceedings of the 41st Convention, Building Trades Department, 1948, Appendix, *infra*, pp. 2a-7a).

The 1948 Plan, which is substantially the same as the present Plan, established a Joint Board providing, as the name implies, *joint and equal representation, voice, and vote to employers and unions alike.* Hence, since its inception, the Plan has required that the Joint Board consist of an equal number of employers (further divided equally between General Contractors and Specialty Contractors)[5] and unions (also equally divided between basic trade unions and specialty unions)

---

[4] On Feb. 11, 1948, in an address to the AGC Convention, NLRB General Counsel Denham stated:

> . . . We of the [NLRB] have suggested to the Associated General Contractors, to the National Associations of Specialty Contractors, and to the officials of the labor organizations that are predominant in the field the desirability of working out among themselves, if possible, some joint procedure to which *both the labor organizations and the members of the various employer associations would be firmly committed.* . . . (emphasis added) [21 LRRM 51 (1948)].

[5] In addition to the withdrawal from the Plan by the Mason Contractors' Association and the Contracting Plasterers' and Lathing International Association during 1963, on September 30, 1969, the Associated General Contractors of America terminated the Plan and withdrew from further participation in its operations, and no General Contractors have been represented on the successor Joint Board since that date. See *Constr. Labor. Rep.*, 732, A-13; 742, A-1 (12/10/69). Mills, *The Construction Industry*, 21 Lab. L.J. 498, 504-5, n.16 (August 1970).

and an "impartial chairman." Moreover, from 1948 to the present time, the express provisions of the Plan as well as the contemporaneous interpretation of the parties thereto have recognized that the Plan would be compatible with the statutory requirements of § 10(k) only so long as the employer responsible for the assignment of the disputed work specifically "stipulated" or otherwise assented to be bound by Joint Board decisions.[6]

Thus, Article V, § 5 of the original Plan (App., *infra,* p. 6a), and Article III, § 7 of the Plan in effect at the time of the instant dispute have preserved the following identical[7] provision:

> It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL-CIO, shall be considered as bound by this agreement *when they have signed a stipulation* setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement. (Emphasis added).[8]

---

[6] See statement of Richard J. Gray, President of the Building Trades Department, at the time the Plan was adopted. (Appendix, *infra,* p. 1a). The history and development of the Joint Board is reviewed in Strand, *Jurisdictional Disputes in Construction: The Causes, The Joint Board, and the NLRB,* 89 *et seq.* (1961).

[7] The only language change was to substitute "AFL-CIO" for "A.F. of L." following the 1955 merger.

[8] After the Associated General Contractors terminated the original Plan and withdrew from further negotiations, a renegotiated Plan was executed on April 7, 1970, between the Building and Construction Trades Department and the "Participating [Specialty] Contractors' Employers' Associations." The identical provision appearing in the text which binds the Plan only to those contractors who "have signed a stipulation" was carried forward into the current Plan ("Green Book," Art. III, § 7, p. 10, 1970).

The foregoing provisions of the Plan have also been restated, with additional elaboration, as part of the "Procedural Rules and Regulations of the National Joint Board":

> These procedures shall apply to:
>
> (a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL-CIO, and *who have signed a stipulation* setting forth that they are *willing to be bound* by the terms of the agreement establishing the Joint Board, *or* who are members of a signatory association of contractors with *authority to bind* its members *or* who are parties to a collective bargaining agreement *providing* for the settlement of jurisdictional disputes under the procedures herein set forth. (Emphasis added).[9]

---

[9] In 1955 and 1957, the Joint Board retained Professor Archibald Cox (later, Solicitor General) to prepare and file comprehensive briefs with the NLRB in the *A. W. Lee*, 113 NLRB 947, and *Acoustical Contractors*, 119 NLRB 1345, cases, respectively. In these briefs, Professor Cox made it clear that the Joint Board itself adhered to the unequivocal language of the Plan and that its procedures were binding only on those employers who stipulated themselves to the Joint Board. Thus, in suggesting to the NLRB how it should handle "cases in which all parties are not bound by the Joint Board agreement," the Joint Board understood that employers were "parties" to the dispute, and specifically acknowledged that the NLRB "must" proceed to determine the matter under § 10(k). Thus, "[T]o put the matter concretely, suppose that a general contractor not bound by the Joint Board Agreement assigns laborers to erect a twenty-foot self-supporting scaffolding. The carpenters would probably claim the work. *If they strike and a charge is filed, the NLRB must make a determination under Section 10(k).*" (Emphasis added). [*Acoustical Contractors*, (Jt. Bd. Br. p. 57)]. See also, excerpt of Joint Board Brief filed as Appendix to Respondent's Brief (pp. 1a-4a) in *NLRB* v. *Radio and Television Broadcast Engineers Local 1212, ("CBS")*, 364 U.S. 573 (1961), No. 69, Oct. Term, 1960.

The Joint Board, in its twenty-two years of operation, has blatently ignored the foregoing express requirements of the Plan and its Procedural Rules and Regulations by consistently rendering "decisions of jurisdictional disputes between unions whether or not the employers making the assignment of disputed work are bound thereto."[10] It was this consistent practice which produced the recent impasse in Joint Board negotiations and caused the AGC to sever its twenty-year relationship with the Plan. It was this same consistent practice which caused the Laborers' Union, as one of the union members of the Joint Board Negotiating Committee, to vote against continuation of the Plan. And it is because of Joint Board persistence in assuming the power to bind a non-assenting party in violation of its own rules that makes conflict between it and the NLRB inevitable.[11]

As noted previously, the Plan was adopted in 1948 in response to the strictures imposed by the statute, and the NLRB, as well as union and employer members of the industry itself, clearly recognized that the responsible employer was an indispensable party in the resolution of any jurisdictional dispute. Consistent with

---

[10] Statement to court below by Building and Construction Trades Department, *Amicus Curiae, Brief*, p. 4.

[11] Since § 10(k) becomes operative only where a union engages in conduct violative of § 8(b)(4)(D), the hoped-for alternative to industrial strife which the Joint Board Plan was to provide has not been realized; and the inevitable conflict arises in those cases where employers are not stipulated, and the union successful before the Joint Board resorts to picketing and other self-help measures to enforce an award which the employer has no obligation to respect. See, *e.g., Bldg. & Constr. Trades Council (Charles J. Dorfman)*, 173 NLRB No. 208, 69 LRRM 1594 (1968); *Plumbers Local 189 (R. W. Wander)*, 176 NLRB No. 129, 71 LRRM 1340, 1341, n.2 (1969).

this contemporaneous understanding and the unequivocal provisions of the Plan, the NLRB in the instant case found that Texas State Tile and Terrazzo Company ("Texas State") had not assented to be bound by the Joint Board (NLRB Pet., App. D, pp. 84, 91), and quite properly proceeded to determine the merits of the dispute as required by § 10(k) of the Act.[12] In reversing the NLRB, the court below, like the Joint Board, totally ignored those express provisions of the Plan which require employer stipulations; and by severing the employer's interests and assigning no role to the employer in the resolution of jurisdictional disputes, the court has, in effect, rewritten the Joint Board Plan and reinstituted the pre-1948 "Referee" system. Moreover, by gratuitously stating that the Plan and its operations was subject to no "infirmity that undercut its fairness and reliability" (NLRB Pet., App. A, p. 48), the court further compounded its error by placing the imprimatur of judicial propriety upon a procedure which is inherently defective and unfair in its administration.

The interpretation rendered by the court below poses serious and unsettling questions for employers and unions in the building and construction industry. From the union's point of view, present authority indicates that an international union and its affiliates are bound by Joint Board determinations as long as they remain

---

[12] In the instant case, the Plasterers' Union protested Texas State's assignment of the disputed work to Tile Setters by *picketing* and by submitting the matter to the Joint Board. In contesting the same assignment by Martini Tile and Terrazzo Company, the Plasterers' Union limited its protest to picketing; the merits of the dispute, however, were never submitted to, or considered by, the Joint Board. (NLRB Pet. App. D., pp. 85-86).

affiliated with the Building and Construction Trades Department.[13] If access to the NLRB is now to be foreclosed to non-stipulated employers, local unions presently performing assigned work who feel aggrieved by adverse Joint Board awards may well find no alternative available other than to disaffiliate from their parent International Union; and this course of action will eventually threaten the very existence of the Building and Construction Trades Department itself. From the employer's point of view, the decision below appears to say that the only way a non-stipulated employer may now avoid the effects of an inter-union agreement and ensure that Joint Board awards will not be given "binding" force is to operate on a non-union basis and make work assignments to employees who are represented by no union affiliated with the Building and Construction Trades Department. The decision below thus poses a very real and immediate threat to the continued vitality and growth of the organized segment of the construction industry. With no alternative available other than drastic action, the field of industrial conflict will inevitably be broadened as parties affected by jurisdictional disputes restructure themselves in order to avoid the strictures of a non-voluntary Plan.

---

[13] *A.W. Lee*, 113 NLRB 947 (1955). But *cf.*, *Operating Engineers Local 450 (Rust Engineering Co.)*, 169 NLRB No. 149, 67 LRRM 1389, 1391 (1968), where the NLRB noted that with respect to "outside" line work the International Brotherhood of Electrical Workers "has consistently refused participation in the NJB [National Joint Board], and we have in the past recognized this refusal." See also, *Millwrights Local 1862 (Jelco, Inc.)*, 184 NLRB No. 58, 74 LRRM 1485, 1486 (1970).

III. THE DECISION BELOW UNDERMINES VOLUNTARY ARBITRATION PROCEDURES

The NLRB, in administering the provisions of § 10 (k), is vested with discretion to determine whether the parties have submitted "to the Board *satisfactory evidence* that they have adjusted, or agreed upon methods for the *voluntary adjustment* of, the dispute. . . ." (Emphasis added). In exercising this discretion, the NLRB, faithful to congressional intent[14] and this Court's mandate in *CBS*,[15] has applied to Joint Board proceedings the same notions and standards which are generally applicable to other arbitral bodies. "If by the time the dispute reaches the Board, arbitration has already taken place, the Board shows deference to the arbitral award, provided the procedure was a fair one

---

[14] See § 203(d) of the Act, 61 Stat. 154, 29 U.S.C. 173(d). See also comments of Senator Murray, "that full opportunity is given the parties to reach a *voluntary* accommodation without governmental intervention *if they so desire.*" (Emphasis added). 93 *Cong. Rec.* 4035, 2 *Leg. Hist. LMRA* (1947), 1046.

[15] In *NLRB* v. *Radio & Television Broadcast Engineers ("CBS")*, 364 U.S. 573 (1961), after ruling that the NLRB was required by § 10(k) to decide work assignment disputes on their merits, this Court stated (at 583):

> It is true that this forces the Board to exercise under § 10(k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes . . . . It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by *arbitrators*, unions, employers, *joint boards* and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. *Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.* (Emphasis added).

and the results not repugnant to the Act." *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 270-271 (1964).

Accordingly, in what has come to be known as the *Spielberg* doctrine, the Board held that it would recognize awards of arbitrators where "[1] the proceedings appear to have been fair and regular, [2] *all parties had agreed to be bound,* and [3] the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." (Emphasis added). *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). The foregoing standard reflects an effort by the NLRB to encourage the voluntary settlement of labor disputes through procedures which incorporate elementary principles of due process. At the same time, where the arbitral process purports to bind a party who has never agreed "to give the arbitrator power to make the award" [16] or where the proceedings are "tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes of the Act," [17] the Board is mandated to ignore the arbitral award and proceed to resolve the underlying dispute.[18] Although the Board's application of the *Spielberg* standards to diverse situations was viewed approvingly by this Court in *Carey* v. *West-*

---

[16] *United Steelworkers* v. *Warrior & Gulf*, 363 U.S. 574, 582 (1960).

[17] *International Harvester Company*, 138 NLRB 923, 927 (1962).

[18] Section 10(a) of the Act, 29 U.S.C. 160(a) provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . . ." See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 267-8 (1940).

inghouse,[19] the court below, in overturning more than twenty years of NLRB experience and practice in dealing with jurisdictional disputes, displayed neither awareness nor concern that it was also overturning the entire corpus of NLRB-arbitration precedent.

The NLRB has been a reluctant dragon of sorts in the jurisdictional arena: while it would have preferred Congress to place dispute-resolving mechanisms in the hands of arbitrators or private bodies, Congress deleted the provisions which would have authorized private arbitration "leaving it to the *Board alone* 'to hear and determine' the underlying jurisdictional dispute." (Emphasis added). (*CBS,* 364 U.S. 573, 581). Accordingly, in discharging its responsibilities, the NLRB has earnestly sought to effectuate congressional policy by developing standards and guidelines which will accommodate its undoubted 10(k) authority to private arbitration procedures. And it has endeavored to support Joint Board procedures by inviting the parties thereto to develop the kind of objective procedures which would comport with basic due process standards required of all arbitration bodies.[20]

---

[19] *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261, 270-271, notes 7 and 8 (1964). See also, *Smith* v. *Evening News Association,* 371 U.S. 195, 198, n. 6 (1962).

[20] See, *e.g., Millwrights' Local 1102 (Don Cartage),* 154 NLRB 513 (1965), where the NLRB recognized that the parties to the Plan had agreed to revisions providing for a new appeals procedure. In the context of the case before it, the NLRB noted that the employer responsible for the work assignment was not a member of this newly revised Joint Board and stated: "We cannot now say, therefore, that the new Joint Board will be able definitely to settle, on the broad basis desired, the jurisdictional dispute between the contending Riggers' and Carpenters' Locals. Nevertheless, we believe the new Joint Board should be given the opportunity to resolve this dispute on a *voluntary* basis." (Emphasis added). (154 NLRB, at 517). The Court of Appeals for the District of Columbia Circuit reversed and remanded this case with instructions

The Joint Board, however, has refused to heed the NLRB's invitation, and has adamantly continued in its practice of disregarding the provisions of its own arbitration Plan. There is, therefore, a pressing need to correct the error implicit in the decision below, and ensure that unfair or irregular arbitration proceedings will not receive hospitable treatment under national labor policy.

IV. THE DECISION BELOW DISRUPTS ESTABLISHED COLLECTIVE BARGAINING RELATIONSHIPS AND CONFLICTS WITH OTHER STATUTORY PROVISIONS

The Laborers' Union is typical of many of the unions in the construction industry in that it, and its affiliates, are signatory to thousands of collective bargaining agreements (national and local in scope) covering hundreds of thousands of employees. Most of these agreements do not contain provisions requiring resort to the procedures of the Joint Board in the event a dispute arises over an employer's work assignment. Under the reasoning of the court below, however, regardless what the parties to the collective bargaining agreement negotiated, Joint Board procedures and awards are now to be engrafted upon the parties' understandings by operation of law.

Further, the court below embraced the Joint Board in the belief that it alone could provide "permanent" resolution of work assignment disputes because the NLRB has no authority "to compel an employer to change his assignment or a union to renounce an assignment that the employer is willing to give." (NLRB

---

requiring the Board to determine the merits of the dispute under § 10(k). *Quinn & Riggers & Machinery Erectors, Local 575* v. *NLRB*, 61 LRRM 2690, 2691 (unreported decision, Nos. 19673 and 19686, March 29, 1966). See also, *Jefferson County Carpenters' District Council (S&W Masonry, Inc.)*, 173 NLRB No. 190, 69 LRRM 1577, 1578, n. 6 (1968).

Pet. App. A, p. 45). Aside from the fact that Joint Board awards provide no *real* permanency because they are limited to the "particular job only,"[21] the inherent defect in the foregoing rationale is that decisions of the Joint Board, or any other private tribunal, are totally ineffective in causing a non-stipulated employer to change his assignment. Although a court proceeding under § 301 of the Act (29 U.S.C. 185) might decree that the successful union before the Joint Board is entitled to perform specified work and the losing union is not (which is precisely what NLRB determinations under § 10(k) presently provide), there is no legally enforceable way to require a non-stipulated employer to honor the Joint Board award or any subsequent court decree, or to employ members of the successful Union. Indeed, the litigation which the decision below has already prompted[22] raises serious and virtually insoluble questions. For example, if the decision below actually contemplates that the losing union should "renounce an assignment," what protection does it have when the employer commences his own § 301 or § 303 suit against that union for violating its collective bargaining agreement?[23] And in the

[21] The Procedural Rules and Regulations of the Joint Board provide:

> 8. Each job decision of the Joint Board shall state that the job decision was predicated upon the particular facts and evidence before the Joint Board regarding the dispute and *shall be effective on the particular job only*. (Emphasis added). (§ 8, p. 14, April 17, 1968).

[22] See cases cited *supra*, note 3.

[23] As this Court recognized in *CBS*, there is no requirement for "... 'substantive symmetry' between § 303(a)(4) on the one hand, and §§ 8(b)(4)(D) on the other," and specifically noted that it "has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes (citing *Juneau Spruce*)." [364 U.S. 573, 584-5 (1961).]

same circumstances, what protection is afforded to the renouncing union when employees file unfair labor practice charges, and commence individual lawsuits for the union's breach of its duty of fair representation and for removing the beneficial provisions of their collective bargaining agreement? Further, if an employer is to cease recognizing the incumbent collective bargaining representative and replace the existing employees with members of a "stranger" union which received the Joint Board award, how is the NLRB to handle charges alleging that the replacement of employees violates § 8(a)(3), that the recognition of the "stranger" union violates § 8(a)(2), and that in the process there was a trampling on the "employees" established §7 rights?

The decision below has thus set in motion what already appears as an endless chain of unwarranted litigation which, unless checked by this court, may well destroy established collective bargaining relationships and split the construction trades movement wide open.

CONCLUSION

For the above noted reasons, as well as those stated by the National Labor Relations Board, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. CONNERTON
ARTHUR M. SCHILLER
JULES BERNSTEIN
905 - 16th Street, N. W.
Washington, D. C. 20006
202/737-8320
Counsel for Laborers' International Union of North America, AFL-CIO

December 1970

APPENDIX

[Excerpt From Report of President, Building and Construction Trades Department, To 41st Annual Convention, November 10, 1948]

Plan for Settlement of Jurisdictional Disputes

During the past year the Department devoted a considerable portion of its time to the problem of working out a plan under which judisdictional disputes could be settled promptly and equitably, without loss of time. For years the prevention and settlement of jurisdictional disputes have been our most serious problems, and time after time we have tried various plans, all of which were of value, but no one of which was as successful as we had anticipated it would be. A new formula was obviously needed, and this we hope we have found in the Plan for the Settlement of Jurisdictional Disputes which went into operation on May 1st of this year.

I cannot emphasize too strongly the fact that this Plan does not owe its inception to the Taft-Hartley Act, although it satisfies the requirements of that act, and was dicussed a number of times with Mr. Robert Denham, General Counsel of the NLRB. Long before the passage of the Taft-Hartley Act we were engaged in negotiations with the Associated General Contractors in the attempt to find a workable way out of the difficulty. More than a year and a half ago, months before the Taft-Hartley Act was adopted, a plan for a National Joint Conference Board of the Building Industry, made up of both employers and representatives of labor, was drafted and was about to be submitted to the membership for ratification, when premature publicity made it impossible of completion. The Department went right to work on a substitute plan. In January of this year the plan began to take final shape, and I presented it to the Associated General Contractors on February 12th, at their convention in Houston, Texas. It was ratified on the same day by the AGC, and later was also ratified by seven specialty contractors' associations—Painting and Decorating Contractors of America; National Association of Master Plumbers; Contracting Plasterers International Association; National Electrical Contractors Association; Tile Contractors Association of America; Heating, Piping and Air Conditioning Contractors Association, and the Sheet Metal Contractors National Association. Early in March the Executive Council of the Department, in a special meeting, approved the plan, and on March 11th it was submitted to the Presidents of the national and international unions and ratified by them. In order to take advantage of the Plan contractors do not have to belong to one of the ratifying associations, but must employ members of unions affiliated with the Building and Construction Trades Department, and must sign a stipulation agreeing to be bound by decisions of the National Joint Boards.

The continuing, administrative agency of the Plan is the Board of Trustees, which also is authorized to decide whether disputes submitted to the Impartial Chairman are the subject of decisions or agreements of record. The Board of Trustees consists of M. A. Hutcheson of the Carpenters, Frank A. Fitzgzerald, of the Operating Engineers (taking the place of James W. Close, deceased), William O'Neill of the Plumbers and Pipe Fitters, and myself, representing labor, and J. D. Marshall of the A.G.C., Edward P. Palmer, of Senior & Palmer, general contractors, Paul M.

* * *

[Excerpt From Official Proceedings]

ANNUAL REPORT OF EXECUTIVE COUNCIL

Building and Construction Trades Department American Federation of Labor

Cincinnati, Ohio
November 10, 1948

To the Officers and Delegates in Attendance at the Forty-first Annual Convention of the Building and Construction Trades Department, AFL.

Greetings:

The Executive Council of the Building and Construction Trades Department had before it many cases since the Convention in San Francisco, California, in October, 1947. We wish to report that three regular Executive Council meetings were held this year and one Special meeting on the following dates: January 21-25, 1948, Miami, Florida; Special meeting March 9, 1948, Washington, D. C.; May 5-6, 1948, Milwaukee, Wisconsin, and August 18-20, 1948, Chicago, Illinois.

A report of the action taken at these meetings is presented below, and we submit same to this Convention for consideration and action:

CASE NO. 1. Proposed Plan for Settling Jurisdictional Disputes.

At the January meeting the Executive Council members continued their discussion of the Proposed Plan for Settling Jurisdictional Disputes at some length and it was agreed that representatives of national contractors associations be invited to appear before the Executive Council for the purpose of discussing the proposed plan, after which General Counsel Denham and Mr. John Dunlop of the National Labor Relations Board would appear.

Mr. Robert N. Denham, General Counsel of the National Labor Relations Board and Mr. John Dunlop, representative of the National Labor Relations Board appeared before the Executive Council. Mr. Denham advised the Executive Council at length relative to certification elections and other points of interest in regard to the Labor-Management Act.

The following committee of representatives of National Associations of Contractors appeared before the Executive Council:

Mr. Carl Jansen, President, Dravo Corporation, Pittsburgh, Chairman, A.G.C. Labor Relations Committee.

Mr. Roy Pickett, President, Walbridge Aldinger Company, Detroit, Vice-Chairman, A.G.C. Labor Relations Committee. (Representing Building Contractors).

Mr. Morris DeWitt, Porter DeWitt Company, Poplar Bluff, Missouri, Representative, A.G.C. Labor Relations Committee. (Representing Highway Contractors)

Mr, L. C. Rogers, President, Bates & Rogers Construction Company, Chicago Illinois, Member A.G.C. Labor Committee. (Representing Heavy Construction).

Mr. J. D. Marshall, Assistant Managing Director, A.G.C. Washington, D. C.

Mr. H. R. Cole, Executive Secretary, Tile Contractors Association of America, Inc., Washington, D. C. (Representative of Specialty Contractors).

Mr. William J. Cour, National Electrical Contractors Association, Washington, D. C. (Representative of Specialty Contractors).

Mr. Jansen presented statement relative to the Proposed Plan for Settling Jurisdictional Disputes with suggested changes and after a thorough discussion it was decided that Mr. Jansen and President Gray meet for the purpose of seeing to what extent they could come to an understanding as to the various provisions of the proposed draft and report back to the Executive Council the result of their conference.

The proposed plan as developed by Mr. Jansen and President Gray was again submitted to the Council and a general discussion was held.

The representatives of the contractors associations advised the procedure they would have to follow before definite approval of the Proposed Plan could be given. The representatives of National Associations of Specialty Contractors are to take the matter up immediately with their associations and the Associated General Contractors are to take the matter up at their convention to be held February 10th, in Dallas, Texas.

Mr. Denham and Mr. Dunlop again appeared before the Executive Council with representatives of the contractors associations present and advised relative to elections for certification and the setting up of areas throughout the United States for the the purpose of holding elections.

Mr. Denham requested that consideration be given to the appointment of a Joint Steering Committee from both groups to assist the National Labor Relations Board in their efforts to set up areas throughout the United States and to assist the National Labor Relations Board generally.

The Executive Council then gave consideration to the matter of holding a special meeting of the nineteen Presidents for the purpose of presenting the Proposed Plan, and upon motion of Vice-President Durkin, seconded by Vice-President Byron, it was unanimously decided that the Executive Council hold a special meeting on March 9th and that the General Presidents be advised by President Gray to hold themselves in readiness for a meeting the second week of March, in Washington.

At the Special meeting of March 9, 1948 President Gray advised the Executive Council the purpose of the special meeting, reading Case No. 4 of the Executive Council's Supplementary Report to the San Francisco convention which sets forth the procedure to be followed in preparing the proposed plan for the settlement of jurisdictional disputes. President Gray further advised that the Associated General Contractors and seven National Associations of Sub or Specialty Contractors had approved the proposed plan.

A general discussion was held in regard to several portions of the proposed plan and upon motion of Vice-President Tracy, seconded by Vice-President McSorley, it was decided unanimously to present the proposed plan to the nineteen General Presidents for their adoption or rejection.

(On March 11, 1948, a meeting of General Presidents or their representa-

tives was held in Washington, D. C., and the following plan for Settling Jurisdictional Disputes was adopted to become effective May 1, 1948).

PLAN FOR NATIONAL JOINT BOARD FOR SETTLEMENT OF JURISDICTIONAL DISPUTES

Approved by the Building and Construction Trades Department, A. F. of L., as per instructions of the fortieth annual convention and by the Associated General Contractors and committee representing the Specialty Contractors.

"In consideration of the mutual promises and covenants herein contained, it is agreed by and between the parties hereto as follows:

ARTICLE I

"Effective Date—Sec. 1. This agreement shall take effect on May 1, 1948, and shall remain in force and effect until December 31, 1948, and shall continue in effect for each year thereafter unless terminated as provided for herein. Changes or amendments to this agreement may be made as provided for herein.

"Sec. 2. Any party signatory to this agreement desiring to change or terminate this agreement shall notify the other party in writing at least thirty (30) days prior to the 31st day of December of any year. When notice for change is given, the nature of the changes desired must be specified in the notice. This agreement shall be subject to change at any time by mutual consent of the parties hereto. Any changes agreed upon shall be reduced to writing and signed by the parties hereto, the same as this agreement.

ARTICLE II

"Establishment of Board.—Sec. 1. There shall be established a National Joint Board for the Settlement of Jurisdictional Disputes in the building and construction industry to be composed of an impartial chairman, two (2) members selected by the Building and Construction Trades Department of the A. F. of L., and two (2) members selected by the employers, one of whom shall be a member of the participating general contractors of the industry and one representing the participating national associations of specialty contractors in the construction industry.

"Sec. 2. There shall be set up a labor and industry pool of 24. The 12 industry pool members shall be selected by the various participating employers' associations and shall represent employers of members of the building and construction trades organizations affiliated with the Building and Construction Trades Department; and 12 members of the labor pool shall consist of the Vice-Presidents of the Building and Construction Trades Department of the A. F. of L., and four (4) General Presidents of National and International Unions affiliated with the Building and Construction Trades Department.

"Selection From Pools of Labor and Industry Members to Sit With Chairman.—Sec. 3. When a dispute has been referred to the Joint Board, the Chairman of the Joint Board shall select from the industry and labor pools, subject to the approval of the labor and industry members of the Board of Trustees, two (2) men from each who shall sit with the Chairman and pass judgment and render a decision on any matters pertaining to jurisdictional disputes which are referred to the Joint Board. In making these selections from the industry and labor pools,

two men from each pool as provided for in Section 1, Article II, shall be selected who are in no way connected with or involved in the dispute which is to be acted upon by the Joint Board.

ARTICLE III

"Board of Trustees.—Sec. 1. There shall be established a Board of Trustees. The Board of Trustees shall consist of the Joint Board Chairman, four (4) labor members and four (4) employer members, two of the employer members shall be representatives of general contractors and two of the employer members shall be representatives of specialty contractors, selected by the participating parties to this agreement.

"The industry and labor members of the Board of Trustees shall have the duty of selecting the impartial chairman provided for in Section 1 of Article II of this agreement.

"The Board of Trustees as provided for herein shall in all cases first investigate the claims of the disputing parties to determine whether or not a disposition thereof has been made by a previous decision of record or by recorded agreement between the parties to the present dispute, and issue a ruling as to the decision or the agreement governing in the case. For this purpose, all agreements and decisions recognized under the provisions of the constitution of the Building and Construction Trades Department shall be considered as constituting the record.

"The Board of Trustees shall prepare annually a budget of the necessary expenses for the following twelve (12) months, and shall submit the same to the Building and Construction Trades Department, A. F. of L., and to the National Associations of Employers, signatory to this agreement, for approval. The total amount of the budget when approved shall be subscribed annually in advance, fifty (50) percent by the Building and Construction Trades Department, A. F. of L., and fifty (50) percent by the participating National Associations of Employers, signatory to this agreement. All expenditures shall be within the approved budget, and the Board of Trustees shall have complete supervision over the same and shall render an annual report to the Building and Construction Trades Department, A. F. of L., and to participating employers associations.

"Joint Board Rules and Regulations.—The Chairman and Board of Trustees shall have the authority to establish such procedural regulations and administrative practices as may be required for the effective administration of this agreement provided such regulations and practices are consistent with the expressed terms of this agreement.

"Sec. 2. It is understood that in signing this agreement the parties agree to bear their appropriate share of the Joint Board's expense and to furnish their representatives on the Joint Board, the labor and industry pools provided for in this agreement.

ARTICLE IV

"Duties of the Joint Board.—Sec. 1. It shall be the duty of the Joint Board to consider and decide all cases of jurisdictional disputes in the building and construction industry which are referred to it by any of the International Unions

involved in the dispute, or an employer directly affected by the dispute on the work in which he is engaged; or by a participating organization representing such employer.

ARTICLE V

"Joint Board Procedure.—Sec. 1. When a dispute is filed with the Board, the Chairman thereof shall immediately notify the President of the Building and Construction Trades Department of the existence of such dispute and the President of the Department shall call a conference of the General Presidents involved for the purpose of bringing about an agreement. If a satisfactory agreement is concluded, the President of the Department shall immediately submit to the Chairman of the Board a copy of the agreement reached, properly signed by the contesting parties and attested by the President of the Department. The terms and provisions of this aforesaid agreement shall remain in effect as per the provisions of the Constitution of the Department. In the event the dispute is not settled by agreement between all the parties involved at the end of ten (10) days, the Chairman of the Joint Board shall docket the case for hearing and decision in accordance with the procedure hereinafter outlined.

"Sec. 2. In the event any party to a dispute fails to present their case within the stated time, the Joint Board shall, nevertheless, proceed with the case and make its decision on the basis of the evidence presented.

"Sec. 3. When the Board of Trustees finds a dispute has not been settled by a decision or agreement of record, the Chairman of the Board shall notify all General Presidents of National and International Unions affiliated with the Building and Construction Trades Department and participating employers organizations, stating the controversy which is to be considered and allow all parties interested to present evidence, orally or by brief or both. The Joint Board shall give thirty (30) days notice of the date set for hearing. Briefs shall be submitted and exchanged by all parties to the dispute at least ten (10) days prior to the hearing date.

"Making Decisions.—Sec. 4. The Joint Board shall in every instance consider all pertinent evidence, and shall render a decision, if possible, within ten (10) days after the conclusion of the hearings. Copies of the Joint Board's decisions shall be sent to all parties signatory to this agreement.

"Sec. 5. Any decision or interpretation by the Joint Board shall immediately be accepted and complied with by all parties signatory to this agreement.

"It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the A. F. of L., shall be considered as bound by this agreement when they have signed a stipulation setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement.

ARTICLE VI

"Local Settlements.—Sec. 1. In any community or area where a plan for the settlement of jurisdictional disputes which has been recognized by the Building and Construction Trades Department now exists, it shall be used in the first in-

stance to bring about an agreement or settlement. However, any such local settlement or agreement shall only apply to the particular job in question, and an appeal therefrom may be taken directly to the Joint Board by any of the parties as provided for in Section 1 of Article IV.

ARTICLE VII

"Continuance of Work.—Sec. 1. Pending a decision by the Board or such settlement as may be arrived at through the offices of the Building and Construction Trades Department, A. F. of L., there shall be no stoppage of work arising out of any jurisdictional dispute.

"Members of organizations affiliated with the Building and Construction Trades Department shall continue to work on the basis of their original assignments, provided no employer will assign employes to perform work contrary to decisions or agreements of record.

ARTICLE VIII

"Sec. 1. It is the sense of the parties hereto that the members and Chairman of the Joint Board shall tender to the National Labor Relations Board, their services as expert witnesses in any hearing held by the Board under the provisions of Section 10 (k) of the National Labor Relations Act, as amended, and that no fees shall be charged for such service beyond the statutory witness fees and mileage allowance.

"Signed for the Building and Construction Trades Department, A. F. of L.:

Richard J. Gray,
President.
Herbert Rivers,
Secretary-Treasurer.

"Signed for the Participating Employers Associations:

Paul M. Geary,
H. R. Cole.

"Signed for the Associated General Contractors of America, Inc.:

H. E. Foreman,
Managing Director.
J. D. Marshall,
Assistant Managing Director."

At the May meeting President Gray reported relative to the minutes of the Board of Trustees and the procedures set up by the Board.

At the August meeting an extensive discussion was held relative to the workings of the National Joint Board for Settlement of Jurisdictional Disputes. President Gray advised the Executive Council relative to the activities of the Board thus far, and it was regularly moved and seconded that President Gray contact the contractors representatives signatory to the agreement and request conference at the earliest possible date to discuss possible changes in the agreement.

MOTION FOR LEAVE

INDEX

	Page
MOTION	1
INTERESTS OF THE AMICI	2
CONCLUSION	5
BRIEF	7
INTERESTS OF THE AMICI	8
REASONS FOR GRANTING THE WRIT	8
I. The Court Below Committed Plain Error In Holding the Employer Was Not a Party to a Jurisdictional Dispute	9
II. The Decision Below Does Not Enhance Permanent Resolution of Disputes	14
III. The Disruptive Impact of the Decision Below Compels Immediate Review	15
CONCLUSION	18

CITATIONS

CASES:

Acoustical Contractors, 119 NLRB 1345 (1957)	12
Carey v. *Westinghouse Corp.*, 375 U.S. 261 (1964)	10
Local 450, Int'l Union of Op. Eng. v. *Elliott*, 256 F.2d 630 (5th Cir. 1958)	11
National Labor Relations Board v. *Local 825, Int'l Union of Op. Eng.*, 326 F.2d 213 (3rd Cir. 1964)	11
National Labor Relations Board v. *Local 825, Int'l Union of Op. Eng.*, 410 F.2d 5 (3rd Cir. 1969)	11
National Labor Relations Board v. *Radio and Television Broadcast Engineers Union*, Local 1212 (CBS), 364 U.S. 573 (1961)	3-4, 14
New Orleans Typographical Union No. 17 v. *National Labor Relations Board*, 368 F.2d 755 (5th Cir. 1966)	11

STATUTES: Page

Quinn v. *National Labor Relations Board*, 61 LRRM 2690 (D.C. Cir. 1966) ____ 11
National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*):
Section 8(b)(4)(D) ____ 2, 9, 10, 11
Section 10(k) ____ 2, 8, 9, 10, 11, 12, 14
Section 10(l) ____ 16
Section 301 ____ 15, 17

MISCELLANEOUS:

33 NLRB Ann. Rep. 208 (1968) ____ 5
J. Dunlop, *Jurisdictional Problems in Construction Industry*, 40 LRRM 18 (1957) ____ 13
Plan for National Joint Board for Settlement of Jurisdictional Disputes, Art. III, Sec. 7 ____ 11
O'Donoghue, *Jurisdictional Disputes in the Construction Industry*, 52 Geo. L. J. 314 (1964) ____ 13
Strand, *Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB* 89 (1961) ____ 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1184

NATIONAL LABOR RELATIONS BOARD,

Petitioner;

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(1) of the Rules of this Court, the following contractor associations—Associated General Contractors of America, International Association of Wall & Ceiling Contractors, Mason Contractors Association of America, National Roofing Contractors Association, and National Utility Contractors Association—hereby move for leave to file a brief amicus curiae in support of separate petitions for a writ of certiorari filed by the National Labor Relations Board in No. 1184

and by Texas State Tile and Terrazzo Co., *et al.*, in No. 1231. Plasterers Local 79 [1] declined to grant consent to the filing of a brief amicus curiae on behalf of the above-designated contractors; all other parties to this proceeding consented in writing.

The petitions in No. 1184 and No. 1231 seek review of a decision by the District of Columbia Circuit, setting aside a finding by the NLRB that the Plasterers had violated Section 8(b)(4)(D) of the Act. In reversing the NLRB, the court specifically rejected a NLRB policy of twenty-years' standing and held that the NLRB has no authority under Section 10(k) of the Act to determine a jurisdictional dispute where the unions involved in the dispute have agreed upon a voluntary method of adjusting the dispute.

INTERESTS OF THE AMICI

1. The amici here are all national associations representing contractors in various phases of the construction industry. The Associated General Contractors of America ("AGC" herein) represents approximately 9,000 general construction contractors who perform contracts in the amount of approximately $75,000,000,000 per year. The other amici represent approximately 3,000 contractors providing specialized construction, usually as subcontractors, at all kinds of construction projects: the International Association of Wall & Ceiling Contractors represents more than 450 contractors involved in the application of wall and ceiling systems; the Mason Contractors Association represents more than 1500 masonry contractors, who annually perform contracts for masonry construction in excess of $750,000,000; the National Roofing Contractors Association represents 600 contractors who perform the bulk of all roofing construction in the country; and the National Utility Contractors Asso-

[1] Plasterers Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL-CIO, petitioners below and respondent in the proceedings herein.

ciation represents more than 300 contractors engaged in the construction of utility lines and other utility construction projects.

2. These amici have a substantial interest in the issue raised by the petitioners. The issue involved, the proper interpretation of the jurisdictional dispute provisions of the Act, is of vital importance to all industry, but particularly to the construction industry because that is where most jurisdictional disputes occur.[2] Each of the amici and their constituent members have been involved, and currently are involved, in innumerable jurisdictional disputes with various building trades craft unions. The resolution of these disputes are of vital concern to the contractors involved, because the contractor's economic existence is to a substantial degree affected by the outcome of work-assignment disputes and their speedy resolution.

3. Ever since the jurisdictional dispute provisions were enacted, these disputes have been handled in a consistent manner before the NLRB, with the employer participating along with the unions to present their respective positions. The NLRB's administration of these provisions has resulted in minimizing extensive work stoppages, and has resulted in awards in jurisdictional disputes based upon relevant criteria as required by this Court's decision in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union, Local 1212 (CBS)*, 364 U.S. 573 (1961). The decision below rejected the NLRB's consistent interpretation of the Act, and disrupts the settled procedure for determining jurisdictional disputes. The holding of the court below would operate to displace the NLRB as the primary body determining jurisdictional disputes and to eliminate the participation of the affected employer in resolving juris-

[2] The latest annual report of the NLRB shows that 64 percent of the 478 jurisdictional dispute charges filed in the preceding year involved disputes in the construction industry. 33 NLRB Ann. Rep. 208-209 (1968).

dictional disputes over the employer's assignment of work. In the construction industry, the effect of this decision would be to place the determination of nearly all jurisdictional disputes in the National Joint Board, since building trades craft unions are, pursuant to their affiliation with the Building and Construction Trades Department (AFL-CIO), bound to submit their disputes to that body.

4. The court's decision presents grave problems to the construction industry. The National Joint Board, in making its awards, has consistently subordinated factors essential to the operation of a contractor's business (economy, efficiency, ability, etc.) to reliance upon ancient and outmoded agreements or decisions of record (many dating back to early 1900's), and as a result many employer associations have now withdrawn from that Board. None of the amici here are stipulated to the current National Joint Board. Accordingly, the court's decision places the resolution of work-assignment disputes, a matter of vital concern to a construction contractor's economic existence, in the hands of a body which scarcely considers essential managerial considerations and before which the contractor is not entitled to participate.

5. The court's decision is contrary to the plain intent of Congress, as reflected in the statutory language. Moreover, the court's interpretation reflects its misconception of the underlying nature of jurisdictional disputes as understood by Congress, and also as understood by the creators of the National Joint Board, employer and union representatives alike. These misconceptions led to the essential premise to the court's decision—*i.e.*, that the employer to a jurisdictional dispute is a neutral who "cares not how the dispute is decided but wants merely that it be decided."[3] This premise is patently incorrect, and even the history of the National Joint Board plainly shows that body always has considered

[3] See App. A, pp. 37-38, NLRB Petition in No. 1184.

the employer to have a vital interest in the outcome of the settlement, and its procedures have emphasized the importance of the employer's full participation in the settlement process.

6. The amici urge that the issue raised in the respective petitions is of vital significance to the construction industry, and that they, as national associations for general contractors, subcontractors and specialty contractors, appropriately represent the interests of that industry. Further, the amici suggest that because of the AGC's primary role in the creation of and long-time participation in the National Joint Board, they are uniquely qualified to present in their brief the approach of the National Joint Board to jurisdictional disputes and the current failures therein.

CONCLUSION

For the foregoing reasons, the amici respectfully request the Court to grant this motion for leave to file the accompanying brief amicus in support of the above-referenced petitions for writ of certiorari to the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

JOSEPH M. STONE
815 Fifteenth Street, N. W.
Washington, D. C. 20005

GEORGE L. PLUMB
135 South LaSalle Street
Chicago, Illinois 60603

A. W. OXHOLM
2000 P Street, N. W.
Washington, D. C.

Counsel for the Amici

January 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1231

TEXAS STATE TILE & TERRAZZO CO., INC., MARTINI TILE & TERRAZZO CO., TILE CONTRACTORS ASSOCIATION OF AMERICA, INC.,

Petitioners,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 1184

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INTERNATIONAL ASSOCIATION OF WALL & CEILING CONTRACTORS, MASON CONTRACTORS ASSOCIATION OF AMERICA, NATIONAL ROOFING CONTRACTORS ASSOCIATION, AND NATIONAL UTILITY CONTRACTORS ASSOCIATION.

INTERESTS OF THE AMICI

This brief is submitted pursuant to Rule 42 of this Court, subject to the Court's granting of the Motion for Leave to File a Brief as amicus curiae, filed herewith, in support of petitions for a writ of certiorari filed in No. 1231 by Texas State Tile and Terrazzo Co., *et al.*, and in No. 1184 by the National Labor Relations Board. These petitions seek review of the same decision by the United States Court of Appeals for the District of Columbia Circuit; each presents the same issue.

References to the opinions below, the jurisdictional statement, the question presented, and the relevant statutory provisions are set forth in pp. 1-3 of each of these petitions.

The interest of the amici is stated in the attached Motion (*supra*, pp. 2-5), and is not repeated herein.

REASONS FOR GRANTING THE WRIT

The petitions filed in this case question the validity of the court of appeals' interpretation of an important provision of the Act. The holding of the court of appeals—that the NLRB has no authority to determine a jurisdictional dispute under Section 10(k) when the competing unions have agreed upon a voluntary method for the resolution of the dispute—is contrary to the consistent interpretation the NLRB has given since Section 10(k) was enacted in 1947, and which has been accepted without qualification by the courts of appeals and the industry itself.

The decision of the court, if allowed to stand, undoubtedly would have an unsettling effect on all industry because it clouds with uncertainty the role of the NLRB and the employer in the resolution of jurisdictional disputes. In particular, in the construction industry, where

most jurisdictional disputes occur,[1] the decision threatens to disrupt stable and beneficial relationships, and seriously to impair the employer's reasonable control over essential economies in the operation of his business.

The issue presented is therefore of manifest importance in the administration of the Act and the maintenance of industrial peace.

I. The Court Below Committed Plain Error In Holding the Employer Was Not a Party to a Jurisdictional Dispute.

The decision of the court below turns on the court's definition of the "parties" to a jurisdictional dispute within the meaning of Section 10(k) of the Act. The NLRB is directed under that section to determine a jurisdictional dispute underlying an unfair labor practice charge under Section 8(b)(4)(D) unless "the parties" to that dispute have agreed on a method of settlement. The NLRB has consistently held that the struck employer as well as the competing unions are parties to the jurisdictional dispute; however, the court below rejected the NLRB's interpretation, holding that it "is not the employer but the rival unions (or other employee groups) who are the parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question" (NLRB Pet., App. A, p. 33). Accordingly, the court held that the NLRB "may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions have agreed to settle their dispute . . . ." (NLRB Pet., App. A, p. 24). The court's interpretation of the word "parties" is plain error, finds no support in the statute or legislative history, and is contrary to the interpretation given by the National Joint Board from the time of its creation.

a. The statute does not specifically define just who are parties to a jurisdictional dispute, but the language

[1] See n. 2, *supra* p.

of the relevant provisions plainly shows that the employer as well as the competing unions are deemed to be "parties" to the dispute. Section 8(b)(4)(D) makes it an unfair labor practice for a union to picket or coerce an employer for an object of forcing the employer to assign work to one group of employees rather than to another group. When a charge is filed under Section 8(b)(4)(D), the NLRB is required under Section 10(k) to "determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the *parties to such dispute* submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute." [Emphasis supplied.]

Thus, the "parties" to the jurisdictional dispute, by the clear terms of the statute, are the parties to "the dispute out of which" the 8(b)(4)(D) charge was filed; and that dispute must include the employer, because no charge under 8(b)(4)(D) can be filed until the union has picketed the employer or taken some other prohibited action to force the employer to assign the work to its members. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263-264 (1964). Therefore, the unions must already have made the employer a party to the dispute before Sections 8(b)(4)(D) and 10(k) can become operative; he is accordingly a "party" to the dispute for the purposes of Section 10(k).

b. The NLRB has so determined the scope of the term "parties" in Section 10(k) from the time the first cases under that provision arose. Accordingly, under 10(k), the NLRB proceeds to determine all jurisdictional disputes unless all the parties—the competing unions and the employer—have agreed upon methods for the voluntary adjustment of the dispute.[2] The NLRB's construction, except for the decision here, has never been chal-

[2] See cases cited in NLRB Pet., p. 12 n. 7.

lenged by any court of appeals, and indeed, has been favorably relied upon by several courts.[3]

The National Joint Board, from its inception, has also agreed with this interpretation of the meaning of "parties" and the abstention provision of Section 10(k). Indeed, the National Joint Board came into being in 1948 because union and industry groups believed that a joint dispute-settling body was necessary to comply with the abstention provision of Section 10(k).

Prior to the enactment of the Taft-Hartley amendments in 1947, the construction unions affiliated with the Building and Construction Trades Department utilized an inter-union "Referee" system for resolving jurisdictional disputes. This system provided for no form of employer participation. After Taft-Hartley, the Referee system was dropped, and the construction unions entered into negotiations with employer groups in an effort to devise a plan which would conform to the requirements of Sections 10(k) and 8(b)(4)(D). On May 1, 1948, these negotiations resulted in the establishment of the National Joint Board, with the Associated General Contractors ("AGC"), seven national associations of specialty contractors, and the Building and Construction Trades Department as signatories. This plan by its terms bound only those employers and unions who were stipulated to its procedures.[4] The Joint Board rec-

---

[3] *National Labor Relations Board* v. *Local 825, Int'l Union of Op. Eng.*, 326 F.2d 213, 216 (3rd Cir. 1964); *Local 450, Int'l Union of Op. Eng.* v. *Elliott*, 256 F.2d 630, 635-636 (5th Cir. 1958); *National Labor Relations Board* v. *Local 825, Int'l Union of Op. Eng.*, 410 F.2d 5, 9 (3rd Cir. 1969); *New Orleans Typographical Union No. 17* v. *National Labor Relations Board*, 368 F.2d 755, 763 (5th Cir. 1966); *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690 (D.C. Cir. 1966).

[4] For this background, see Strand, *Jurisdictional Disputes in Construction: The Causes, the Joint Board, and the NLRB* 89-99 (1961). See, Plan for National Joint Board for Settlement of Jurisdictional Disputes, Art. III, Sec. 7.

ognized that the employer assigning the disputed work was an indispensable party in the resolution of the jurisdictional dispute, and that in the absence of an employer stipulation to the Joint Board, the employer was free under Section 10(k) to take the case to the NLRB even though both unions were stipulated to the Joint Board.[5]

c. The primary basis for the court's interpretation of "the parties" to the dispute was the court's assumption that the employer in a jurisdictional dispute was a "neutral * * * caught in the crossfire between the disputing unions and unable to satisfy either", that he "cares not how the dispute is decided but wants merely that it be decided," and that the "purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups." (NLRB Pet., App. A, pp. 37-38). The assumption that an employer is necessarily a neutral party in a jurisdictional dispute is, however, contrary to fact and economic realities.

The employer in most jurisdictional disputes, particularly in the construction industry, is vitally concerned that the work be performed by a particular group of employees. In that industry, a job is usually obtained through competitive bidding, oftentimes highly competitive bidding. The contractor's bid is carefully based on factors relevant to the employees to whom he assigned the work—*i.e.*, their wage rates, their efficiency, their ability to perform work at the desired quality level, the size of the crew required by the group, etc. The award of this work to another group of employees could result in considerably higher costs because of a change in any

---

[5] Strand, *op. cit.*, n.4, *supra*, at 93. Further, in briefs submitted to NLRB, the National Joint Board acknowledged that employers are "parties" to jurisdictional disputes and that the NLRB must decide cases under Section 10(k) where the struck employer is not stipulated to the Joint Board. See, *e.g.*, Brief of the Joint Board (p. 57) in *Acoustical Contractors*, 119 NLRB 1345 (1957).

or all of these factors. Moreover, the award of the work to another group of employees could even lead to the contractor's losing the contract. For example, if, as is so often the case, the contractor has a collective bargaining agreement with a union covering particular work and he assigns the work to that union pursuant to the agreement, an award of the work to a stranger union would require the employer either to hire a new complement of employees represented by the stranger union or else give up the contract. Accordingly, for these obvious reasons, and others, a contractor's economic existence is to a substantial degree affected by the resolution of work-assignment disputes, and he is vitally interested in the outcome.

Moreover, the National Joint Board has recognized from its inception that the employer has a vital interest in the outcome of jurisdictional disputes, and its procedures have emphasized the importance of the employer's participation in the settlement process. Professor Dunlop, the first chairman of the Joint Board, has written in this regard: "The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues and both have a vital contribution to make to their orderly settlement." [6]

In view of the employer's vital interest in the outcome of these disputes, and the recognition of this by writers and the Joint Board itself, the court below plainly erred in concluding that the employer's interests were fully served without his participation in the settlement.

d. Nor is the court below correct in asserting that the legislative history supports its view. The committee reports and floor debates disclose absolutely no discussion

[6] J. Dunlop, *Jurisdictional Problems in Construction Industry*, 40 LRRM 18, 19 (1957). See O'Donoghue, *Jurisdictional Disputes in the Construction Industry*, 52 Geo. L. J. 314, 320-321 (1964): "an employer is not necessarily a neutral party unconcerned with which group performs the work."

of what was meant by the phrase "the parties to such dispute" in Section 10(k). And the court's reference to a statement by Senator Morse to the effect that 10(k) would encourage unions to set up machinery for the settlement of controversies within their own ranks is inapposite, for in the speech quoted by the court Senator Morse specifically referred to union machinery "settling such disputes short of economic action." (NLRB Pet., App. A, pp. 39-40). Thus, Senator Morse was plainly expressing the hope that the Act's proscriptions would encourage unions to resolve their differences prior to taking any economic action; his comments do not at all indicate that once the coercive action is instituted the unions could under 10(k) settle the dispute among themselves without the employer's participation. Thus, the legislative history does not support the court's conclusion. As Judge MacKinnon stated in dissenting to the majority opinion below (NLRB Pet., App. A, p. 57):

> The truth of the matter is that the legislative history of section 10(k) does not afford any substantial assistance to its interpretation and the weakness of the majority opinion is demonstrated by its assertion that it does.

II. The Decision Below Does Not Enhance Permanent Resolution of Disputes.

Section 10(k) of the Act, as this Court noted in *CBS*, *supra*, 364 U.S. at 576, "emphasizes the belief of Congress that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions." The court below erroneously concluded that its interpretation of Section 10(k) would enhance the permanent resolution of disputes.

According to the court, although the Act does not make a private settlement between two unions binding on the employer, the winning union in such a settlement could

enforce the award by suing under Section 301 to "secure injunctive relief against a union that has failed to abide by its agreement to honor the Joint Board decision and renounce the work." (NLRB Pet., App. A., p. 45). However, the employer is not bound by the Section 301 decision because he has no agreement to be bound to the Joint Board decision, and he may therefore ignore the decision and assign the work to a third group of employees. Thus, the court's view fails to enhance the permanent resolution of disputes through voluntary means. Rather, by excluding the employer from necessary participation in any dispute-settling procedures, the court's view tends to work to the contrary because such procedures would inevitably result in lesser consideration to management needs and therefore less opportunity for the employer to embrace the result. Further, the court's view is likely to lead to further litigation where the employer has an agreement concerning the work in dispute with the losing union; if that union renounces the work, the employer could sue under Section 301 for breach of contract.

On the other hand, the NLRB's requirement that both unions and the employer must assent to a voluntary method of adjustment does enhance permanent resolution of a dispute. An arbitration agreed upon by the employer and the rival unions would be binding upon all and fully enforceable through normal contract means or Section 301. Thus, this rule effectuates the congressional purpose of enhancing the permanent resolution of jurisdictional disputes.

III. The Disruptive Impact of the Decision Below Compels Immediate Review.

a. The decision of the court of appeals, if permitted to stand, threatens to create industrial strife and impair legitimate managerial considerations throughout industry, but particularly in the construction industry. The effect of the court's decision in that industry would be to place

the determination of nearly all jurisdictional disputes in the National Joint Board, since nearly all construction unions are stipulated to that body.

This would be a matter of grave concern to the construction industry, for in making its awards the Joint Board has consistently subordinated factors essential to the operation of a contractor's business (*e.g.*, economy, efficiency, ability) to reliance upon ancient and outmoded agreements and decisions of record, some, as in this case, dating back to the early 1900's. As a result many employer associations have now withdrawn from the Joint Board.[7] None of the associations participating in this brief are stipulated to the current Joint Board. Accordingly, the court's decision places the resolution of work-assignment disputes, a matter of vital concern to a construction contractor's economic existence, in the hands of a body which scarcely considers essential managerial considerations.[8] And since the Joint Board paid little heed to

---

[7] The AGC and seven specialty contractor associations were the first employer groups stipulated to the Joint Board procedures. This Joint Board Plan terminated in 1969 when the AGC and four specialty contractor associations were unable, after lengthy negotiations, to secure certain reforms in the existing plan. The AGC later refused to become signatories to a new Joint Board Plan which went into effect on April 3, 1970. Other specialty contractor associations including Mason Contractors Association, and National Roofing Contractors Association, amici here, withdrew years earlier, as did the Tile Contractors Association, petitioner in No. 1231.

[8] Similarly, the court's decision threatens to disrupt the role of the employer as well as the NLRB in other industries as well. Enterprising unions, on either an industry-wide basis or a case-by-case basis, could mutually agree to a method of adjustment of the dispute, and thereafter resolve the dispute on whatever factors best satisfied their own self-interest. Such a procedure, affecting as it does a matter of such vital concern to the employer's operation of his business, raises questions of fundamental fairness of due process proportions, particularly since the employer would be under the compulsion of unlimited picketing by the union which received the award. (For the inapplicability of an injunction under Section 10(l), see pp. 19-20 of the petition of Texas State Tile, *et al.*, in No. 1231).

managerial considerations when it was of the view that the statute required the employer's participation, it can easily be assumed that the Joint Board will not respond more favorably to these considerations in light of the ruling of the court that the employer has no part in the determination of the dispute.

The effect of jurisdictional dispute resolutions which fail fairly to reflect essential management considerations will surely be to promote litigation and industrial strife. Employers will be forced to ignore the awards, and therefore face the economic consequences of picketing and other coercive acts designed to force acceptance of the awards. Moreover, some employers may seek non-union labor. Further, unions successful before the Joint Board will undoubtedly litigate to compel an employer to change his assignment or sue under Section 301 to compel the unsuccessful union to renounce an assignment that the employer has given. Indeed, five such suits have already been filed since the decision of the court below.[9]

Also, the decision assuredly will disrupt existing and stable bargaining relationships which have been encouraged under other provisions of the Act. Thus, the Joint Board does not recognize jurisdictional claims in collective bargaining agreements between the contractor and a union. In the case here, the Joint Board awarded the work to Plasterers despite the fact that the employer had a collective bargaining agreement with Tile Setters covering the same work and had no agreement with Plasterers (NLRB Pet., App. D, p. 89). If the employer accepted the award and assigned the work to Plasterers, he would breach his contract with the Tile Setters and potentially be subject to suit under Section 301 of the Act. On the other hand, if the employer refused to accede to the award, but the Tile Setters renounced its claim to the

---

[9] See cases cited at page 20, n. 22 of the petition in No. 1231 by Texas State Tile and Terrazzo Co., *et al.*

work pursuant to its stipulation to the Joint Board, the Tile Setters would potentially be subject to a similar suit.

b. The issue raised by the petitions is an important and recurring issue in the administration of the Act. The decision of the court is plainly founded on erroneous bases. Its impact, however, is to create substantial uncertainty, to threaten existing and stable relationships and practices, and to engender much litigation. In the interests of preserving industrial peace and avoiding unwarranted disruption with the operations in an essential phase of the economy, there is an urgent need for this Court to grant review of the instant case.

CONCLUSION

For the foregoing reasons, and those stated in the petitions filed in No. 1231 and No. 1184, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH M. STONE
815 Fifteenth Street, N. W.
Washington, D. C. 20005

GEORGE L. PLUMB
135 South LaSalle Street
Chicago, Illinois 60603

A. W. OXHOLM
2000 P Street, N. W.
Washington, D. C.

Counsel for the Amici

Dated: January 1971